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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ANDRE JEROME HUGHES, Defendant and Appellant.	G050878 (Super. Ct. No. RIF1304945) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Michael B. Donner, Judge. Affirmed as modified.

Russell S. Babcock, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Sean M. Rodriquez, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury found defendant Andre Jerome Hughes guilty of violating Penal Code sections 246.3, 245, subdivision (a)(2) and 29800, subdivision (a)(1), negligent discharge of a firearm as charged in count one of the information, assault with a firearm as charged in count two and felon in possession of a firearm as charged in count three. (Unless otherwise noted, all statutory references are to the Penal Code.) With regard to count two, the jury found it to be true defendant personally used a firearm, a revolver, within the meaning of sections 12022.5, subdivision (a) and 1192.7, subdivision (c)(8).

In a bifurcated trial, the court found three enhancements to be true, two under section 667.5 subdivision (b) and one under section 667, subdivision (a). The court sentenced defendant to 16 years in state prison.

Defendant contends numerous errors, each of which is discussed separately below. We find merit in his argument the trial court erred in finding one of the enhancements under section 667.5, subdivision (b) to be true. In all other respects, we affirm.

I

FACTS

A Riverside County Sheriff testified that on May 31, 2013, he was on patrol in Moreno Valley. Around noon, he responded to a "shots fired call." Officers were already at the scene detaining people, and he detained Melvin Betts. Betts said the shooter "was a guy by the name of Andre," and the gun was a silver or black revolver type. The officer said it was significant that a revolver was involved because "we probably weren't going to find a shell casing."

Betts testified he and his girlfriend were at the apartment of his aunt, Patricia Green, on May 31, 2013. Eight or 10 people were in the apartment complex alley there, drinking "For Loco." Betts has known defendant since Betts was a little boy; defendant is Betts's "cousin's boyfriend, husband." Willie James, another cousin of Betts and Green's son, was yelling at defendant and provoking him. At some point,

James walked up to defendant and defendant got angry and went into the house. About a minute later, James and defendant were arguing again and Betts heard a gunshot. People scattered. The police came "super fast."

Raynesha Robinson, Green's niece, saw and heard defendant and James arguing. Green was crying and tried to push James away. She said that next, "[t]hat's when I heard the gunshot. It scared me because of my kids. I don't know which way it came from." Later she said there were "approximately two" gunshots. But she did not see a gun at that point, although 10 minutes earlier she saw defendant holding a gun. While she does not know the difference between a revolver and a semiautomatic weapon, she described the gun she saw defendant holding as "like a cowboy gun."

Green told two officers defendant was the shooter. Green said defendant pointed the gun at James and she jumped in between them to protect her son. At the moment Green thought defendant was about to pull the trigger, Green said defendant's wife jumped onto his back. Defendant still pulled the trigger, and a bullet bounced next to her and her grandson.

Shortly after the incident, Green took an officer to another part of the complex and showed him which apartment defendant entered. Using a public address system, an officer called for defendant to come outside. Eventually he came outside with his hands up.

II

DISCUSSION

Admission of Previous Convictions

Defendant contends his admissions of previous convictions for battery on a custodial officer and robbery were not voluntary, knowing and intelligent. The Attorney General responds that "because the totality of the circumstances surrounding [defendant's] admission of his prior convictions establishes that his admission was intelligent and voluntary, his claim must be denied."

Prior to trial, the court stated to defendant: "Mr. Hughes, you have the right to have the priors tried to the same jury that's going to hear the underlying case. Same right to a trial by jury. You also, depending on what you decide, can waive trying your priors to the jury and instead try them to the bench; in other words, to this Court. Some feel there may be an advantage to not hear about your priors, but whatever decision you make I'll respect. So take some time to talk with your attorney and let me know what you'd like to do." After speaking with his lawyer, defendant waived his right to have a jury decide whether or not he suffered prior convictions.

After the jury convicted him of the instant crimes, the court brought up the issue of prior crimes. At that time, the court did not advise defendant of any rights, and defendant's lawyer indicated the prosecutor would inquire of defendant, which she did. Defendant then admitted he committed the alleged prior crimes.

In 1938, the United States Supreme Court held a defendant's guilty plea violates due process when the plea is not voluntary and knowing. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 465.) More than 30 years later, the high court decided *Boykin v. Alabama* (1969) 395 U.S. 238. The court noted a defendant's guilty plea involves the waiver of certain federal constitutional rights, including the right against compulsory self-incrimination, the right to confront one's accusers, and the right to a trial. (*Id.* at p. 243.) In *Boykin,* the court held a finding of a voluntary waiver of those rights cannot be based on a silent record. (*Ibid.*)

Later that year the California Supreme Court decided *In re Tahl* (1969) 1 Cal.3d 122. After reviewing the United States Supreme Court's recent decision in *Boykin v. Alabama*, *supra*, 395 U.S. 238, our Supreme Court held "the record must contain *on its face* direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea. Each must be enumerated and responses elicited from the person of the defendant." (*In re Tahl*, *supra*, 1 Cal.3d at p. 132.) The

Tahl court "forewarned" courts and prosecutors they would "be well advised to avoid any . . . uncertainty and to produce for the record the required information." (*Id.* at p. 133.)

In *In re Yurko* (1974) 10 Cal.3d 857, our Supreme Court held admission of a prior conviction requires the same waivers as a guilty plea. (*Id.* at p. 863.) Specifically, a defendant "must be advised of (1) specific constitutional protections waived by an admission of the truth of an allegation of prior felony convictions, and (2) those penalties and other sanctions imposed as a consequence of a finding of the truth of the allegation." (*Id.* at p. 860.) "Proper advisement and waivers of these rights in the record establish a defendant's voluntary and intelligent admission of the prior conviction. [Citations.]" (*People v. Mosby* (2004) 33 Cal.4th 353, 356.)

Those cases in which a defendant was not expressly advised of his or her trial rights (right to trial, confrontation, and right to remain silent) generally fall into two categories: cases where the record is completely silent as to an advisement of rights; and those where the *Boykin–Tahl* advisements are incomplete. (See *People v. Mosby*, *supra*, 33 Cal.4th at pp. 361-364.) The present case falls into the latter category. Defendant was advised of his right to a court trial—he had already waived his right to a jury trial on the state prison prior allegations—but he was not advised of the remaining *Boykin–Tahl* rights.

When an admission has been entered without an express waiver of one of the defendant's trial rights (confrontation or silence), "[t]he pertinent inquiry" is "whether 'the record affirmatively shows that [the admission] is voluntary and intelligent under the *totality of the circumstances* ' [citation] applying 'the test used to determine the validity of guilty pleas under the federal Constitution.' [Citation.]" (*People v. Mosby*, *supra*, 33 Cal.4th at p. 360.) Use of the totality of the circumstances test means California has rejected the rule that "'express admonitions and waivers'" are the sine qua non of a knowing and intelligent waiver. (*Id.* at p. 361, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1178.)

In *People v. Mosby, supra,* 33 Cal.4th 353, the defendant was charged with selling cocaine. The information alleged he had suffered a prior conviction for possessing a controlled substance. (*Id.* at p. 356.) Trial on the prior conviction allegation was bifurcated from the trial on the substantive offense. (*Id.* at p. 357.) *Immediately* after the jury returned a guilty verdict, the defendant admitted the truth of the prior conviction allegation upon being advised by the court of his right to a court trial on the prior conviction allegation. The defendant had already waived his right to a jury trial. (*Id.* at pp. 357-358.) On appeal, the defendant contended his admission was not voluntary and intelligent because he was only advised of his right to a court trial; he was not advised an admission would require him to forego his right to confrontation and his right to be free from compulsory self-incrimination. (*Id.* at pp. 356, 359.)

The *Mosby* court stated the issue to be decided as follows: "When, immediately after a jury verdict of guilty, a defendant admits a prior conviction after being advised of and waiving only the right to trial, can that admission be voluntary and intelligent even though the defendant was not told of, and thus did not expressly waive, the concomitant rights to remain silent and to confront adverse witnesses?" (*People v. Mosby, supra,* 33 Cal.4th at p. 356.) The court found the defendant's admission in that matter was voluntarily and intelligently made under the totality of the circumstances, despite the trial court's failure to expressly advise the defendant and obtain an express waiver of his right to confrontation and his right to be free from compulsory self-incrimination. (*Ibid.*) It reasoned that because the defendant entered his admission after he had "*just* undergone a jury trial at which he did not testify" the defendant "not only would have known of, but had just exercised, his right to remain silent at trial, forcing the prosecution to prove he had sold cocaine. And, because he had, through counsel, confronted witnesses at that immediately concluded trial, he would have understood that at a trial he had the right of confrontation." (*Id.* at p. 364.) Additionally, the court noted

the defendant's prior conviction was the result of a guilty plea and he would have been advised of his *Boykin–Tahl* rights in the earlier case. (*Id.* at p. 365.)

In the present case, trial on the prior conviction allegations was bifurcated from the trial on the charged crimes. During his jury trial, defendant exercised his right to remain silent, and did not testify during his trial on the charged crimes. Through counsel, he vigorously confronted adverse witnesses against him. After the jury returned guilty verdicts, the court set the sentencing date. Before he was sentenced, defendant admitted his prior convictions. Thus, when defendant admitted his prior convictions, he was aware of his right to a jury trial, his right to remain silent and his right to confront witnesses against him. Viewing the totality of the circumstances, we conclude the record demonstrates defendant knowingly and intelligently waived his rights.

Marsden Motions

Defendant next argues the trial court abused its discretion and violated his Sixth Amendment right to counsel in denying his motions for appointment of new counsel. The Attorney General argues the trial court properly denied defendant's motions.

Defendant moved three times pursuant to *People v. Marsden* (1970) 2 Cal.3d 118, to have his court appointed lawyer replaced. The first *Marsden* motion was heard on July 29, 2013, a few months prior to the start of trial. The court and defense counsel were present, but the prosecutor and spectators were excluded. Defendant complained his lawyer did not speak with him or his family about his case. The court inquired of defense counsel, who told the court she spoke with defendant on several occasions and that she implored the family to give her contact information for any witnesses. Defense counsel added that she had spoken with defendant's mother several times, and that defendant's mother accused her of working for the district attorney's office and had threatened to call the State Bar to report counsel. The court asked

defendant for the names and contact information of witnesses. Defendant provided some information. The court denied the motion and informed defendant the court assumed an investigator would be contacting the persons he named.

The second *Marsden* motion was just before the start of trial on September 17, 2013. Once again, only the court, defense counsel, defendant and court staff were present. Defendant had the same complaints he previously raised. Defense counsel told the court an investigator had spoken with all but one witness who "hung up" on the investigator three or four times. Defense counsel added she had received discovery from the People and had spoken with defendant's mother approximately 15 times since the inception of the case. The court informed defendant his relationship with defense counsel had not reached such a level as to interfere with his right to effective counsel.

At defendant's third *Marsden* motion, he once again had the same complaints and added defense counsel spoke negatively to his mother. Upon a request of the court, defense counsel said she had taken 50 cases to jury trial including four homicides, she had two death penalty cases pending and maintained all of her continuing education credits. Counsel related all she did with regard to investigating and reviewing defendant's case. She said she sent a copy of the discovery to defendant. With regard to defendant's claim counsel had spoken negatively with defendant's mother, counsel told the court she told defendant's mother she did not think she would be successful at attaining a defense verdict and that it was unfortunate if defendant interpreted that as negative. The court denied the motion.

"We review a trial court's decision declining to relieve appointed counsel under the deferential abuse of discretion standard. [Citations.]" (*People v. Jones* (2003) 29 Cal.4th 1229, 1245.) The rule under *Marsden* is well settled. ""'"When a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney's inadequate performance.

[Citation.] A defendant is entitled to relief if the record clearly shows that the first appointed attorney is not providing adequate representation [citation] or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'" [Citation.]'" (*People v. Abilez* (2007) 41 Cal.4th 472, 487-488.)

Defendant reported to the court the various difficulties he thought he had with his attorney, including a perceived lack of investigation and communication with him and his family. The court questioned counsel about the investigation, about communications and about counsel's experience. Additionally, the court facilitated communication by personally questioning defendant about contact information for witnesses, and inquiring of counsel whether or not those witnesses would be contacted. The court informed defendant his relationship with counsel had not affected his right to effective counsel. Under the circumstances found in this record, we find no reason to conclude the court abused its discretion in denying defendant's *Marsden* motions.

Substantial Evidence

Defendant claims there is insufficient evidence to support his convictions for willful discharge of a firearm in a grossly negligent manner as charged in count one and assault with a firearm as charged in count two. He contends there is no evidence the discharge of his firearm was intentional or that he discharged it in the direction of the victim.

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value" in support of the court's decision. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) """"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably

be reconciled with a contrary finding does not warrant a reversal of the judgment."' [Citations.]'" [Citation.]" (*Ibid.*)

"Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment pursuant to subdivision (h) of Section 1170." (§ 246.3, subd. (a).) "Gross negligence, as a basis for criminal liability, requires a showing that the defendant's act was "'such a departure from what would be the conduct of an ordinarily prudent or careful [person] under the same circumstances as to be incompatible with a proper regard for human life, or, in other words, a disregard of human life or an indifference to consequences.'" [Citation.]" (*People v. Alonzo* (1993) 13 Cal.App.4th 535, 539-540.) "Since the Legislature did not define 'gross negligence' for purposes of [section 246.3], it appears from the statutory language and the legislative history that it intended that term to have the meaning commonly attributed to it in criminal law, but to criminalize such conduct only if, under the circumstances, it actually had the potential for culminating in personal injury or death." (*Id.* at p. 539.) It is beyond dispute that shooting a gun in an area where people are present constitutes gross negligence. (*Id.* at p. 540.)

"Any person who commits an assault upon the person of another with a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not less than six months and not exceeding one year, or by both a fine not exceeding ten thousand dollars ($10,000) and imprisonment." (§ 245, subd. (a)(2).) Section 240 defines an assault as an "unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (§ 240.) "To point a loaded gun in a threatening manner at another . . . constitutes an assault, because one who does so has the present ability to inflict a violent injury on the other and the act by

its nature will probably and directly result in such injury. [Citations.]" (*People v. Miceli* (2002) 104 Cal.App.4th 256, 269.)

Here defendant and James were in a heated argument. According to Betts, defendant was angry and went inside the house. Witnesses saw defendant with a gun when he came outside. Green said defendant pointed the gun at James and she jumped in between them to protect James. At the moment defendant was about to pull the trigger, defendant's wife jumped onto his back. Defendant still pulled the trigger, and a bullet bounced next to Green and her grandson.

Under the circumstances we find in this record, we conclude sufficient evidence supports the jury's conclusions that defendant violated sections 246.3 and 245.

Enhancement for September 28, 1995 Robbery Conviction

Both sides agree the court erred when it imposed two enhancements on the same offense, one for one year and another for five years. During sentencing, the trial court stated: "I'm sentencing you to one year in state prison to run consecutive, full and consecutive to the sentence imposed in Count 2." The court also stated: "I'm sentencing you to the enhancement of five years in state prison to run consecutive to Count 2."

In *People v. Jones* (1993) 5 Cal.4th 1142, the defendant's sentence was also enhanced under sections 667.5, subdivision (b) and 667, subdivision (a). The California Supreme Court reversed, finding "the most reasonable reading of subdivision (b) of section 667 is that when multiple statutory enhancement provisions are available for the same prior offense, one of which is a 667 enhancement, the greatest enhancement, but only that one, will apply." (*Id.* at p. 1150.)

Because *Jones* prohibits using the same prior offense to impose a prison prior enhancement under section 667.5, subdivision (b) and a serious felony enhancement under section 667, subdivision (a), the trial court erred here. Defendant's one-year enhancement imposed under section 667.5, subdivision (b) is ordered stricken.

III

DISPOSITION

Except as to the enhancement under section 667.5 subdivision (b), as it relates to defendant's September 28, 1995 robbery conviction, the judgment is affirmed.

MOORE, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.